



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/171567

PRELIMINARY RECITALS

Pursuant to a petition filed January 22, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance, a hearing was held on February 23, 2016, at Milwaukee, Wisconsin. The record was held open for submission of a written argument; it was submitted.

The issue for determination is whether the agency correctly discontinued Petitioner's Medicaid eligibility because of a divestment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. Petitioner has been receiving institutional Medicaid but those benefits were discontinued because the agency determined that a divestment occurred. Petitioner's case was subject to review in the fall of 2015 and the agency sent Petitioner a notice dated December 8, 2015 that informed her that her institutional Medicaid was discontinued as of October 23, 2015 because of a divestment.
3. Petitioner has been receiving institutional Medicaid for some time. She has had no assets in her name; any assets she had were transferred to community spouse.
4. In June 2013 Petitioner's spouse lent \$30,000.00 to the couple's son in exchange for a promissory note requiring monthly payments of \$281.99. The agency found the note to be actuarially sound. The promissory note involved here does not contain any provision that permits cancellation at the death of the lender
5. In January 2015 Petitioner's spouse passed away and in November 2015 Petitioner's son notified the agency that he would no longer make payments on the promissory note. The balance due at that point was \$25,952.70.
6. Petitioner's son is her legal guardian.

DISCUSSION

In making the divestment determination that agency relied on the following:

17.12.2.1 Promissory Notes on or After July 14, 2015

Beginning with promissory notes created on or after July 14, 2015, notes that cannot be considered assets because they are non-negotiable, non-assignable, or have no market value may be considered divestments. The divestment will be effective either at the time the note was created or at the time it was made non-negotiable, whichever is later.

...

Medicaid Eligibility Handbook (MEH), §17.12.2.1, Example omitted.

The promissory note involved here was executed in June 2013; the above does not apply. The applicable *Medicaid Eligibility Handbook (MEH)* provision relevant at the time (the current version is virtually identical – the spelling has changed on the words ‘cancelled’ and ‘cancellation’) states:

17.12.2 Promissory Notes on or After 01/01/09

The purchase of a promissory note, loan or mortgage, on or after January 1, 2009, is a divestment unless such note, loan or mortgage meets all of the following criteria:

- Has a repayment term that is actuarially sound (paid out in the individual's life expectancy). The standards that must be used to decide whether or not a note, loan, or mortgage is actuarially sound are those determined by the Office of the Chief Actuary of the SSA. The standards are found in a table (called the Period Life Table), which can be found on the following SSA Web page: <http://www.ssa.gov/OACT/STATS/table4c6.html>. Use this table to calculate the individual's life expectancy as of the date the note, loan, or mortgage agreement was initiated. Determine if the lender was expected to live long enough so that he or she would receive payment in full during his or her lifetime,
- Provides for payments to be made in equal amounts during the term of the loan, with no deferral or balloon payments made,
- Does not allow cancellation of the note, loan or mortgage upon the death of the lender. Under Wisconsin law, the outstanding loan balance on these types of contracts is not automatically

cancelled upon the death of the lender. Cancellation of the loan balance can only occur if the contract contains specific language to this effect. If a note, loan or mortgage contains language to cancel the balance upon the death of the lender, the note, loan or mortgage can be amended to remove this language and avoid a divestment penalty, and

If all of the criteria above are not met, the purchase of the promissory note, loan, or mortgage is a divestment. The divested amount is the value of the outstanding balance due on the note, loan, or mortgage as of the date of application for Medicaid long-term care services.

...
MEH, §17.12.2.

There is no issue as to the promissory note itself being a divestment here. Rather, it appeared to me at the hearing the real question here is whether Petitioner is the heir of her husband's estate and must take legal action to force payment on the note. Petitioner's attorney submitted a post hearing brief on this area of inquiry.

The *MEH* has the following provision:

- ...
2. It is also divestment if a person takes an action to avoid receiving income or assets he or she is entitled to. Actions which would cause income or assets not to be received include:
 - a. Irrevocably waiving pension income.
 - b. Disclaiming an inheritance.
 - c. Not accepting or accessing injury settlements.
 - d. Diverting tort settlements into a trust or similar device.
 - e. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
 - f. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate. Count the action as a divestment only if:
 - o The value of the abandoned portion is clearly identified, and
 - o There is certainty that a legal claim action will be successful. The agency Corporation Counsel makes this determination.

...
MEH, §17.2.1.

Here the agency did not involve the county Corporation Counsel so there has been no determination called for in 2f, above. Further, Petitioner's post hearing brief does include the CCAP entries for the estate of Petitioner's spouse. Those notes indicate a claim against the estate by [REDACTED] in the amount of \$106,832.63. CCAP records show that the estate was a defendant in a foreclosure, Milwaukee County Case # [REDACTED]. The CCAP records for the estate also show an \$11,470.43 claim against the estate by the Wisconsin Department of Health Services. Given all of this, Petitioner argues that it is not likely the estate was solvent. Further, Petitioner also argues that she could not disclaim property as she was not competent, that as the guardian is also the borrower on the promissory note that he would not be taking action against his own interests and, finally, that even if there were a divestment here it could only be for half of the value of the note as Petitioner could only have had a ½ interest in the note under marital property law.

I am concluding that there is no divestment here. Very simply, this is because there was no determination by the county Corporation Counsel (or even the Office of Legal Counsel for the Wisconsin Department of Health Services as Milwaukee Enrollment Services is part of that agency) as to the likelihood of success of a legal action. I also note that the estate closed as of January 15, 2016.

CONCLUSIONS OF LAW

That the agency has not demonstrated that a divestment occurred in this case as it has not demonstrated that legal action to claim a portion of her deceased husband's estate would be successful.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to reverse the divestment determination and restore Petitioner's institutional Medicaid eligibility back to October 2015 provided she is otherwise eligible for those benefits. This must be done within 10 days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of April, 2016

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 26, 2016.

Milwaukee Enrollment Services
Division of Health Care Access and Accountability
Attorney [REDACTED]